

Ethical Considerations¹

I. Introduction

Alternative dispute resolution, though a fairly new field of practice, has indeed developed into a profession. Just as other professionals such as lawyers and doctors owe certain duties to their clients and profession, ADR professionals must also adhere to standards of conduct for the sake of the disputants they serve and the ADR field as a whole. As federal agencies incorporate ADR into all aspects of doing business, the importance of adopting and maintaining ethical standards in their ADR programs becomes a central concern. For clarification purposes, *ethics* should not be confused with *best practices*. Although adherence to ethical standards often contributes to increased effectiveness of an ADR program, this chapter does not address the *best* way to run an ADR program, but rather, the *ethical* way to run a program.

Many standards and codes of conduct have been promulgated for third parties acting as neutrals in a dispute. Unfortunately, as the profession is still relatively young and fragmented, no ruling authority has deemed which of these standards should be universally followed. Direction can be sought from certain sources, such as, the ADR Act of 1996, the Uniform Mediation Act, and the Model Standards of Conduct for Mediators drafted by the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution. However, agencies will ultimately have to determine which ethical standards to incorporate into their programs, and the earlier they address these issues the better.

To whom should these ethical standards apply? The term “ADR professional” usually signifies the neutral third-party to a dispute, and most ethical codes are geared towards conduct within the neutral’s capacity. However, what about the ADR program administrator? The federal employee who manages an ADR program should also uphold the standards of the profession as a manager and service provider. Unfortunately, there is little official guidance in the area of ADR program manager ethics.²

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² The CPR Institute for Dispute Resolution and Georgetown University Law Center are heading a Commission on Ethics and Standards of Dispute Resolution Practice that is currently working on a draft of Ethical Issues for ADR Providers. For more information see <http://www.cpradr.org/ethics.htm>

This chapter outlines the ethical considerations facing both the neutral third-party in a dispute and the ADR program administrator. While there are few concrete rules to rely on and no easy answers to these issues, each agency should thoroughly and thoughtfully address appropriate ethical standards for their programs. Clear standards will help to steer the agency and its neutrals through the difficult ethical quandaries that are certain to present themselves during the life of the ADR program.

II. Ethical Standards for Neutrals

Ethical standards for mediators are based in the definition of *mediation*: *a process in which an impartial third party facilitates the resolution of a dispute by promoting voluntary agreement by the parties to the dispute.* By offering this dispute resolution mechanism to disputants, federal agencies must ensure that the parties' reasonable expectations of the process are met by the mediators and will be protected by the agency. At the heart of mediator ethics, therefore, is the duty of the mediator to provide parties the professional service they were told to expect by both the agency and the ADR profession at large.

An overview of the many ethical standards created for third-party neutrals presents the following basic principles:

A. Competency

A neutral should intervene in a dispute only when the neutral has the necessary qualifications to satisfy the reasonable expectations of the parties.

B. Impartiality

As the basic tenet of mediation, the neutral must conduct the mediation in an impartial manner.

C. Maintaining Confidentiality

To a certain extent, each agency or the parties may create their own rules with respect to confidentiality or dictate a particular set of expectations for certain types of cases. (See the following section on Confidentiality under the ADR Act of 1996.) The extent of confidentiality may depend on the circumstances of the mediation and any agreements the parties make with the mediator. Therefore, the mediator must maintain whatever level of confidentiality the parties and agency reasonably expect. The mediator should not disclose any matter that a party expects to be confidential, unless given permission by all parties, or unless required by law.

- D. Ensuring Informed Consent** The mediator must make every effort to ensure that parties are not coerced into reaching an agreement, that each party has the necessary capacity to make decisions, and that the parties make informed decisions about the agreement. Realistically, a mediator cannot personally guarantee that each party makes a fully informed choice about an agreement, however, the mediator may suggest that parties seek outside counsel before signing an agreement.
- E. Preserving Self-Determination** Mediation is based on the parties' ability to decide for themselves how they want to resolve their dispute. A mediator should not give the parties a decision nor oppose a solution decided upon by the parties. The mediator provides information about the process, raises issues and helps parties explore options, but does not render decisions, even if asked to do so by the parties.
- F. Mediation is not Counseling or Legal Advice** As a neutral third party, a mediator should not provide any other professional judgement or counseling to the parties. If parties need legal advice, personal therapy, or other expert information, the mediator should direct them to consult with an outside source.
- G. Avoid Exposing Parties to Harm as Result of Mediation** The mediator should make all reasonable efforts not to make a bad situation worse, or otherwise cause harm to either of the parties due to their participation in mediation.
- H. Preventing Party Abuse of Process** The mediator should prevent parties from abusing the mediation process, such as when a party lies, is obviously "fishing" for information, stalling to "buy time," concealing important information, or engaging in blatant intimidation.
- I. Conflicts of Interest** A mediator should disclose all actual and potential conflicts of interest reasonably known to the mediator that would create the appearance or existence of potential bias. After disclosure, the mediator should decline to mediate unless all parties agree to retain the mediator's services. A mediator should avoid any appearance of conflict of interest prior, during, and after the mediation.

Ethical Considerations

In identifying and incorporating ethical standards for mediators, federal agencies should consider some of the following questions:³

- ☒ **What situational factors, if any, may affect ethical duties of the mediator?**
- ☒ **What is the nature of the ethical standards? Rigid rules, minimum requirements, aspirational goals, a mix, or some other approach?**
- ☒ **Who should be developing the standards for the agency and for whom?**
- ☒ **What is the relation between ethical duties and “best practices?”**
- ☒ **How specific should the standards be?**
- ☒ **What if standards only provide sketchy or inconsistent guidance? Should some standards be given more weight than others?**
- ☒ **How will or should standards be enforced?**
- ☒ **How should standards be inculcated? How should the mediator’s ethical awareness be sharpened?**
- ☒ **Are there other activities that would help promote ethical behavior in mediation?**
- ☒ **Who reviews the mediator’s ethical practices? What happens if a mediator does not uphold an ethical standard?**

³ Prepared by Charles Pou for the Interagency ADR Working Group Session on Ethics, July 13, 1999.

III. Confidentiality Provisions under the ADR Act of 1996⁴

The Alternative Dispute Resolution Act of 1996 specifically addressed confidentiality protection. The following section enumerates the highlights of the confidentiality provisions of the Act:

A. The Act Provides Explicit, Broad, and Mandatory Protection of Confidentiality

Confidentiality is often critical to successful dispute resolution. To encourage the use of ADR and to protect the integrity of dispute resolution proceedings and the confidence of parties in future proceedings that their communications will remain confidential, the Administrative Dispute Resolution Act of 1996 provides explicit, broad, and mandatory confidentiality protection. Section 574 of the Act (5 U.S.C. §574) prohibits both the neutral and the parties from any voluntary or compelled disclosure of dispute resolution communications in any type of case or proceeding, except as specifically provided for under the Act.

B. The Statutory Definitions are an Important Part of Confidentiality Protection

The confidentiality provisions of §574 incorporate terms that are defined by the Act in 5 U.S.C. §571. As defined by §571:

1. ***Dispute resolution proceeding*** means any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and specified parties participate. 5 U.S.C. §571(6).
2. ***Dispute resolution communication*** means any oral or written communication prepared for the purpose of a dispute resolution proceeding, including any memoranda, notes, or work product of the neutral, parties, or a nonparty participant. 5 U.S.C. §571(5).
3. ***In confidence*** means that information is provided with the expressed intent of the source that it not be disclosed, or under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed. 5 U.S.C. §571(7).

Any written agreement to enter into a dispute resolution proceeding, a final written agreement resulting from a dispute resolution proceeding, and an arbitral award in a proceeding are excluded from

⁴ From Ten Things You Should Know about the Confidentiality Provisions of the Administrative Dispute Resolution Act of 1996, by Diane Liff, Special Counsel, Federal Highway Administration, July 1999.

the §571(5) definition of a “dispute resolution proceeding,” and therefore, are not entitled to confidentiality protection.

C. The Neutral must be Involved in the Communication

Involvement of the neutral in the communication is required for confidentiality protection. The Act protects communications only between the neutral and the parties, because the confidentiality of those communications is perceived as key to successful dispute resolution. Communications between and among the parties are afforded no greater, and no less, confidentiality protection than any unassisted settlement negotiations.

D. Additional Protection for Communications Originating from the Neutral

Specific confidentiality protection is provided in §571(b)(7) for communications originating from the neutral and provided to all parties in the proceeding, such as early neutral evaluations and settlement proposals. This additional protection is intended to facilitate the neutral’s use of such techniques in resolving disputes. See “Joint Explanatory Statement of the Committee of Conference,” appended to the Conference Report of the Administrative Dispute Resolution Act of 1996 (H. Rep. 104-841). 142 Cong. Rec. H11108-11 (daily ed., September 25, 1996).

E. Disclosure by the Neutral Prohibited Except in Specific Circumstances

Disclosure by the neutral is governed by §574(a), which provides that a “neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence” except in four specific circumstances:

1. all parties to the proceeding, or a nonparty who provided the communication, and the neutral consent to the disclosure in writing; or
2. the communication has already been made public; or
3. the communication is required by statute to be made public, and no other person but the neutral is reasonably available to make the disclosure; or
4. a court determines that disclosure is necessary to prevent an injustice, establish a violation of law, or prevent serious harm to the public health or safety.

Voluntary disclosure requires prior notice and written consent, and the Act expresses a preference for seeking confidential information first from the parties, rather than the neutral. Where disclosure is

contested, the Act provides, in §574(a)(4), for judicial determination based on express statutory criteria.

**F. Disclosure by
Parties Prohibited
Except in Specific
Circumstances**

Disclosure by a party is governed by §574(b), which provides that a “party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication” except in seven specific circumstances:

1. the communication was prepared by the party seeking disclosure;
or
2. all parties to the proceeding consent to the disclosure in writing;
or
3. the communication has already been made public; or
4. the communication is required by statute to be made public; or
5. a court determines that disclosure is necessary to prevent an injustice, establish a violation of law, or prevent serious harm to the public health or safety; or
6. disclosure of the communication is relevant to determining the existence or meaning of an agreement or award resulting from a dispute resolution proceeding, or enforcement of it; or
7. except for communications generated by the neutral, the communication was provided or available to all parties to the proceeding.

**G. Improperly
Disclosed
Communications
are Not Admissible**

To enforce nondisclosure, the Act provides in §574(c) that a dispute resolution communication disclosed by the neutral or by the parties, in violation of either §574(a) or §574(b), is not admissible in any proceeding relating to the issues in controversy for which the communication was made.

In addition, if a demand is made on the neutral for disclosure of a communication through discovery or other legal process, §574(e) requires the neutral to make reasonable efforts to notify the parties and affected nonparty participants of the demand. Parties and affected nonparties have 15 days after notification to offer to defend a neutral’s refusal to disclose. If no offer to defend is made, parties and

affected nonparties are deemed to have waived all objection to disclosure.

H. The Act Provides Protection Against Abuses of Confidentiality Protection

While providing broad and mandatory confidentiality protection for dispute resolution communications, the Act also makes clear that this protection should not be used as a sham. In this regard, §574(f) clarifies that otherwise discoverable evidence cannot be protected from disclosure simply by presenting it in the course of a dispute resolution proceeding; and Congress emphasizes that efforts to thwart or abuse any confidentiality protection (e.g., by passing a communication from one party to another through the neutral) will render the protection inapplicable. See, “Joint Explanatory Statement of the Committee of Conference,” appended to the Conference Report of the Administrative Dispute Resolution Act of 1996 (H.R. Rep. No. 104-841). 142 Cong. Rec. H11108-11 (daily ed., September 25, 1996).

I. Confidentiality Communications Exempt under the Freedom of Information Act

The Freedom of Information Act (FOIA), 5 U.S.C. §552, requires federal agencies to make agency records available to the public on request, and “agency records” are defined as documents or information created or obtained by an agency. There are a number of exemptions to FOIA disclosure, including “records that are specifically exempted from disclosure by statute....”

In the Administrative Dispute Resolution Act of 1990, Congress had declared that §574 was not a statute exempting disclosure under FOIA. Consequently, concerns arose about the use of ADR processes to resolve federal agency disputes. In particular, federal agencies were concerned they might be required to disclose confidential agency information as a result of participating in a dispute resolution proceeding. Private parties, who enjoy confidentiality protection for settlement discussions under Rule 408 of the Federal Rules of Evidence, were also concerned that using ADR to resolve disputes with the federal government might permit business competitors to force disclosure of proprietary information that had been revealed in a dispute resolution proceeding.

Congress responded to these concerns in the 1996 Act by inserting a new subsection (j) exempting disclosure under FOIA: (j) A dispute resolution communication which is between a neutral and a party and which may not be disclosed under this section [§574] shall also be exempt from disclosure under section 552(b)(3).” Thus, dispute resolution communications that qualify for confidentiality protection under §574, including communications generated by the neutral and

provided all parties, such as early neutral evaluations and settlement proposals, are also exempt from disclosure under FOIA.

J. Alternative Procedures Possible for Disclosure by a Neutral

Under §574(d)(1) and (2), parties in a dispute resolution proceeding may agree to alternative confidential procedures for disclosures by the neutral, rather than the §574(a) procedures; but to qualify for protection under §574(j) (i.e., exemption from FOIA disclosure), the alternative confidential procedures may not provide less disclosure than the §574 procedures.

IV. Ethical Considerations for ADR Program Administrators

From the perspective of the ADR program administrator, ethical guidelines are not as readily available or clear-cut as they are for neutrals. However, when managing an ADR program, federal employees have a heightened responsibility to ensure that their actions and those of their neutrals follow ethical standards. As no ruling authority has promulgated ethical guidelines for program administrators, agencies need to develop and then adhere to their own policies. Because the heart of ADR ethics is creating and meeting expectations, the more clearly agencies set out the ethical standards for their ADR program managers, the less chance expectations will be misunderstood or unmet.

A. Duties of ADR Program Administrators

Ethics for ADR program administrators stem from the various (and some times competing) duties they owe:

- ***Duty to the Agency.*** Each agency has a mission to fulfill as well as goals for its ADR program, and the program administrator is charged with carrying out those objectives.
- ***Duty to the Program Users.*** The program administrator has a duty to provide a quality service to those who avail themselves of the program. The parties' expectations of the ADR process are created and then met (or not) by the program administrator.
- ***Duty to the ADR Program.*** The ADR program itself is often in need of advocacy and protection within the agency, and the program administrator has an obligation to ensure its viability. During the life of the program, senior agency officials may not be supportive or understanding of ADR, or may ask the program administrator to perform a task contrary to the program's mission, (such as revealing personal information about mediation parties and their positions). The program administrator's commitment to

the ADR program may, at times, seem in conflict with the duty to the agency.

- ***Duty to the ADR Profession.*** If an agency is offering a service that purports to be a form of “alternative dispute resolution,” then the program administrator must ensure that both the process and the neutrals comply with widely recognized standards and definitions of the specific form of dispute resolution.

B. General Issues When Developing Ethical Guidelines

The interplay and practicalities of these duties form the basis of ethical standards of ADR program administrators. Agencies should consider the following general issues facing ADR program administrators when developing ethical guidelines for their program:

1. Quality Control

The program administrator must ensure that the program is providing a quality dispute resolution service and that the neutrals in the program adhere to ethical standards of the profession.

- ***Competence.*** The neutrals in the program must meet minimum requirements of training and experience in ADR, must be sufficiently briefed on the policies and procedures of the agency, and must be evaluated by the program administrator to monitor ongoing capability.
- ***Conflict of Interest.*** Whether the program uses external or internal neutrals, the program manager should assign a mediator without any real or perceived conflict of interest with regard to a specific case.
- ***Professional Standards of Practice.*** The program administrator must ensure that mediators in the program conduct the mediation session following professional standards of practice, (preserving impartiality, confidentiality, informed consent, self-determination, avoiding harm to the parties, and preventing abuse of the process).

2. Neutrality of the Program Administrator

Although the duty to the agency governs the ADR program, the program administrator must maintain neutrality with regard to parties. Agency representatives often participate in mediations; however, the administrator should not take any actions that could be perceived as biased towards either party to a dispute. For example, in the employment arena, the program administrator should be careful not to create the perception of being either pro-employee or pro-

management. The administrator is an advocate of the process-not for either of the parties.

3. Self-Determination of the Parties

The extent of the parties' right to self-determination with regard to participation in ADR depends on the nature of the program. Some agency programs are mandated as a first course of action for claimants, or if a claimant requests ADR, certain agency representatives may be required to attend. However, when the program is offered solely as a dispute resolution option, the program administrator should not coerce disputants into participating in the process. When appropriate, the right to self-determination extends to the decision of whether to participate in ADR or not, as well as to the decision to settle.

4. Roster Management

Whether or not the program uses external or internal mediators, the program administrator may have an ethical obligation to treat the neutrals fairly and professionally. This obligation includes the manner in which mediators are chosen for the roster, how cases are assigned, and how mediators are evaluated. An additional consideration is whether a program administrator, who is also a trained mediator, should self-assign cases from the program. The agency should develop clear policies with regards to roster issues and make decisions that are transparent for the benefit of both neutrals and the users of the program.

5. Protecting Against Abuse of the Process

A program administrator should make every effort to prevent program users from abusing the ADR process. Persons who refer cases to mediation and program participants may both access the program in bad faith, or engage in the mediation process inappropriately. Screening for abuse can be accomplished during various phases of the program; during the intake process, while approving settlement agreements, or as part of an evaluation plan.

6. Protecting Confidentiality

The extent to which confidentiality is afforded to parties and at what stage the protection begins, must be determined by the agency and clearly articulated in the program's policies. While performing the various tasks associated with managing an ADR program, the administrator faces particular challenges in preserving confidentiality. Agencies should consider the following issues in developing a confidentiality policy:

- ***When does the protection of confidentiality begin?*** What communications will be held confidential by the program administrator? If an inquiry is made to the program

administrator, and a potential party discusses personal information, should the administrator keep that information private even if the mediation process does not go forward? To what extent should information given to the administrator during the intake process be kept confidential? If the program administrator observes a mediation, is he or she under the same duty as the mediator not to disclose what is communicated during the session? If the administrator conducts post-mediation follow-ups with program participants, should those conversations be held confidential?

- ***To What Extent will Confidentiality be protected?*** The conventional protection of confidentiality under the law is that communications made to the neutral during a mediation session cannot be used as evidence in future proceedings, and that the neutral will not disclose anything said or done during the session. However, an agency should also consider to what extent its ADR program will extend confidentiality protection internally to its participants. For example, will the program administrator report to senior management specific information about mediations? Will details of participation in mediation be included in personnel files? Will other agency divisions be informed of issues raised in mediations? In workplace ADR programs, are communications made during a mediation session barred from evidence in future internal grievance or other agency complaint processes?

An ADR program administrator interacts with many other individuals within the agency while managing the program. The extent to which the administrator will reveal information about mediation cases to these individuals should be clearly explained in the program's policies, so that all potential participants and other program stakeholders will have realistic expectations of the confidentiality protection. Those individuals include:

- ***Other Program Staff.*** The program administrator may need to consult other ADR program staff members on specific cases in order to plan logistics, assign appropriate neutrals, or assess the appropriateness of mediation.
- ***Mediators.*** The program administrator will most likely need to reveal specific information learned during the intake process to the mediator assigned to the case for briefing purposes.

- ***Program Evaluators.*** Whether the program's evaluators are internal agency personnel or external researchers, the program administrator may need to reveal specific information about cases and participants for evaluation purposes.
- ***Upper Management.*** If a settlement agreement reached during a mediation requires the approval of senior management, then the program administrator may need to reveal certain information about that case for ratification purposes.
- ***Human Resources Personnel.*** In a workplace ADR program, human resource personnel may be needed to effectuate certain mediation cases or settlements.
- ***External Oversight.*** If the agency is subject to external oversight by other entities such as an inspector general, the General Accounting Office, or Congress, certain extreme instances may require the program administrator to reveal information about cases in the ADR program.

The role of ADR program administrator does not lend itself to clearly defined ethical duties and limits. Once again, agencies must thoughtfully consider the responsibilities of the program administrator and attempt to lay out the ethical standards he or she must adhere to while managing the program.

V. Conclusion

While this chapter could not give many clear rules or concrete guidance on ethical standards in ADR in the federal government, many of the issues raised will steer agencies in an appropriate direction. As long as agencies, program administrators, and federal neutrals are aware of their ethical duties, and live up to the standards they set for themselves, the ADR program should continue to make a healthy contribution to the agency's mission and the ADR field as a whole.

Ethics Checklist

Standards for Neutrals

- ✓ Competency - A neutral should have the necessary training and experience in ADR.
- ✓ Impartiality - A neutral should be impartial to all parties.
- ✓ Confidentiality - While each agency sets its own rules for confidentiality, the neutral should not disclose any matter a party expects to be confidential unless it is agreed upon by all parties or required by law.
- ✓ Informed Consent - The neutral should make every effort to ensure the parties are competent, fully understand and are freely choosing all agreements.
- ✓ Self-Determination - A neutral should be a decisionmaker, but should provide process information, raise issues and assist parties in exploring options.
- ✓ No Counseling or Legal Advice - A neutral should not provide professional judgment or counseling to the parties
- ✓ Avoid Escalation - A neutral should make every effort not to worsen the situation or cause harm to any party as a result of the ADR session.
- ✓ Prevent Process Abuse - A neutral should prevent parties from abusing the ADR process by lying, “fishing” for information or stalling to buy time.
- ✓ Conflict of Interest - A neutral should disclose all reasonably known actual and potential conflicts of interest. A neutral should also avoid any appearance of conflict of interest prior, during and after the mediation.

Ethical Considerations for Program Administration

- ✓ Duties:
 - to the agency
 - to the program users
 - to the ADR process
 - to the profession
- ✓ Quality Control
 - Competence
 - Conflict of Interest
 - Professional Standards of Conduct

- ✓ Neutrality of the Program Administrator
- ✓ Self Determination of the Parties
- ✓ Roster Management
- ✓ Protecting Against Abuse of the Process
- ✓ Protecting Confidentiality